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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1274

BRUCE W. STILSON and VALERIE STILSON, on behalf of themselves and all others similarly situated,

Petitioners,

versus

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, READER'S DIGEST SERVICES, INC., a Delaware corporation, READER'S DIGEST BOOKS, INC., a Delaware corporation and READER'S DIGEST SALES AND SERVICES, INC., a Delaware corporation,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

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1. The Questions Presented: The questions presented, as stated by Respondents, *assume the questions of fact and of law which are in issue.* Therefore, Respondents' "questions" are naturally self-answering in their favor.

Petitioners believe that the true questions presented were fairly stated in their Petition for Certiorari.

Petitioners stated, at oral argument before the California Court of Appeal, that if class manageability *became* a problem, the class *could* be limited to a manageable size by the court, for example, to only California residents. Petitioners were *foreclosed* from introducing evidence

regarding the manageability of the class because the trial court foreclosed discovery until after the hearing on Respondents' demurrers and motion to strike. Both the trial court and the appellate court accepted Respondents' statements of class size, which Petitioners were not allowed to question. Those *estimates* varied widely from time to time.

2. Respondents' Brief in Opposition says, in essence, "we did something wrong—i.e., we successfully invaded the Constitutional (as well as the common law and statutory) right of privacy of *millions* of persons—and *no one* (not even this Court) can either keep us from continuing (or repeating) the wrong we did, or take our wrongfully acquired gains out of our pockets". And, further, "we've been able to do this—and deny access to the courts to those wronged—because we destroy the records identifying the people we have wronged immediately after committing the wrong."

Inherent in this smugness and complacency is a dangerous legal lesson in terms of the United States Constitution and *due process*: if an entity is powerful enough and has equipment sophisticated enough to inflict millions of small wrongs, and extract a profit from the millions of small wrongs, it can keep the profit, continue the wrongs and stay beyond the reach of *all* legal procedures and sanctions, whether they spring from common law, state or Federal legislation, or the Constitution.

No meaningful relief can be had against the type of act that took place in this case *except* by class action. Relief for an individual is no relief and no deterrent. Only the prospect of class relief can sufficiently motivate the injured parties to act and the wrongdoer to respond.

Petitioners do not argue that a full trial is required to determine the propriety of a class action, but rather that an "evidentiary" hearing to determine that question, held

without allowing discovery, in a case where critical facts are in the sole possession of the defendant(s), is a *denial* of procedural due process. Petitioners objected to this procedure at every stage in the case (CT 82-83, 109-126; AOB 3-4, 13-15; Pet. Reh. 1-2; Pet. Hrg. 14-16).

3. Petitioners, at every stage, raised the substantive issue of a Constitutional right to personal privacy (CT 105, 103; Pet. Reh. 4; Pet. Hrg. 17-18). Curiously, Respondents do not contend that the right does not exist.

4. Respondents state, in their Brief in Opposition, that Petitioners claim "the right of privacy is guaranteed by the United States Constitution, a claim which is *in no way inconsistent with the decision of the California Courts*" (Brief in Opposition, p. 7). This statement is incredible. Petitioners' claim *must* be *"inconsistent"*, because the California courts, in the face of Petitioners' repeated claims for the right, failed to halt the wrong.

5. Petitioners, contrary to Respondents' statement, did *not* decline a preliminary injunction for the protection of their individual identities. This is the alleged waiver:

> THE COURT: I don't imagine that you'd be satisfied with a preliminary injunction that would prevent the Reader's Digest and its related companies from using your name in their future mail? So from the standpoint it's really the same consideration, isn't it?
>
> MR. STILSON: It is, but the right of the class to the injunction I think is critically important (RT 36).

6. There is a related case now pending before this Court involving some common facts, *Reader's Digest*

Assn., Inc. v. *State of Washington,* No. 72-1206 (opinion below, 81 Wash. 2d 259, 501 P. 2d 290), where *all* of a *Reader's Digest* "sweepstakes" scheme was held *unlawful* in the state of Washington, not just the narrow, but critical, issue of personal rights that this case presents.

7. If identification of each class member be deemed necessary (it would only be necessary at some time before judgment), the record clearly shows that the class criteria could be applied to the computer memory (e.g., Frankel Dep. 28, 55, 77), and such class members as could be identified could be located. Finally, Respondents' argument that an award of nominal damages would limit the rights of those "who might claim more" is specious. After proper notice (see, e.g., *Eisen* v. *Carlisle & Jacquelin,* 52 F. R. D. 253 (S. D. N. Y. 1971) those seeking more, different, or no relief could withdraw from the class and pursue their own remedies.

Petitioners believe that a review of the entire short record in this case, in context, and in chronological order, will support their contentions and will be more fruitful than considering the claims of either counsel as to what the record does or does not contain.

Respectfully submitted,

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